STATES

..., ET AL.

... COUNTY JAIL, ET AL.

... CORRECTION, ET AL.

v.

... THE SUFFOLK COUNTY JAIL, ET AL.
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does a governmental official have the right to withdraw consent to a provision of a consent decree, at will, at any time, in order to litigate its merits, or must that official establish the existence of circumstances which render it no longer equitable to all parties to continue the decree in effect?

2. Did the district court abuse its discretion in concluding that, in light of all the circumstances of this case, it would not be inequitable to refuse to modify the essential element of the consent decree, by doubling the number of inmates that would be housed in most of the cells, thereby creating serious safety problems in cells that were specifically designed for single occupancy?

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STATEMENT OF THE CASE

The ultimate issue on this petition is whether the district court properly refused to modify the single cell requirement that had been agreed upon ten years earlier and that had been the basis for all the efforts of the parties in the interim. The briefs of the petitioners give short shrift to the history of this case, and instead they focus their attention on the legal arguments regarding the proper standard under which consent decrees may be modified. Because of that omission, respondents have set forth this history in considerable detail in order to demonstrate that, while in some cases the standard for modification will be vital, the facts and equities are so clear in this instance that the decision to deny modification, which the district court made under more than one standard, should be affirmed.

A. Proceedings Leading to the Consent Decree

This lawsuit was commenced in 1971 on behalf of the class of inmates of the Suffolk County Jail,[1/] a county facility for pre-trial detainees then known as the "Charles Street Jail." The class was certified under Fed. R. Civ. P. 23(b)(2) on June 29, 1971, consisting of "the inmates of the Suffolk County Jail." (C.A. App. 9).[2/] Defendants

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[1/] The named plaintiffs were Paul P. McLorin, Stephen Gordon, Julio Gonzalez, Carlos Manuel Lopez, Rogelio Santiago and Luis Lopez Perez.

[2/] References are as follows: Joint Appendix: J.A.; Sheriff's Petition for Writ of Certiorari: Sher. Pet.; Appendix for First Circuit Court of Appeals: C.A. App.; Sheriff Rufo's Brief: Sher. Brf.; Commission of Correction Rapone's Brief: Comm. Brf.; Brief for the United States as Amicus Curiae: U.S. Brf.

were the Sheriff of Suffolk County, who operates the jail, M.G.L. c. 127, §16, the Mayor and City Councilors of the City of Boston, who constitute the Suffolk County Commissioners and who have the duty to provide a "suitable jail," M.G.L. c.34, §3, and the Massachusetts Commissioner of Correction, who operates correctional institutions and who sets standards for county facilities. M.G.L. c.124, §1; M.G.L. c.127, §§1A, 1B.

The plaintiffs alleged that the conditions of confinement violated both the Eighth and Fourteenth Amendments to the Constitution. In 1972, the parties submitted two stipulated partial judgments which were entered by the court and which "narrowed the issues to be resolved" at trial. (Sher. Pet. 24a, 50a-54a). The trial consisted primarily of testimony from experts, and the district judge and his law clerk took a view of the entire facility and "without advance notice, stayed overnight in a cell." Id.

In its initial Opinion and Order of June 23, 1973, the district court held that the conditions at the Suffolk County Jail violated the detainees' rights to due process of law under the Fourteenth Amendment to the United States Constitution. Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D.Mass. 1973). (Sher. Pet. 23a). The court reviewed the unhealthy, inhumane and dangerous conditions of confinement of men and women who had been accused of a crime, but not convicted, Sher. Pet. 25a-35a, and concluded that the sole effective remedy was to replace the antiquated jail. (Sher. Pet. 45a). The court found that one of the worst aspects of confinement was the then-prevailing practice of double-celling:

> Cell size is approximately 8' wide x 11' long x 10' high, and was designed and constructed for single occupancy. . . . . It is impossible for two men to occupy one of these cells without regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal frictions.
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> . . .
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> On July 12, 1972 an inmate was beaten to death by his cellmate, who had beaten a previous cellmate in May 1971. Despite the unusual nature of this occurrence, it is evidence of the potential for interpersonal friction inherent in a system of double occupancy of cells . . . .

Sher. Pet. 26a-27a, 27a, n.4. The court concluded that this practice violated the constitutional rights of the pre-trial detainees at the jail:

> Briefly, an inmate at Charles Street who merely stands accused spends from two months to six months or longer awaiting trial. Each day he spends between 19 and 20 hours in a cell with another, strange, and perhaps vicious man. When both inmates are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cell-mate eliminates any hope of privacy; an inmate may not use the toilet except in the presence of a stranger mere feet away.

(Sher. Pet. 42a). Accordingly, as the first element of the interim relief, the court permanently enjoined the

defendants "from housing at the Charles Street Jail after November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial." (Sher. Pet. 48a). The court also enjoined the defendants from holding any detainees at the jail after June 30, 1976. (Sher. Pet. 48a). No appeal was taken.[3/]

By 1977 virtually no progress had been made on producing a plan for a replacement facility. After prodigious, but fruitless, efforts by a Special Master, Judge Garrity set a firm date for the closing of the jail, and he ordered the expenditure of funds to acquire and renovate existing facilities in Suffolk and Middlesex Counties. (J.A. 22, 34).

All parties appealed; the defendants because they objected to the intrusiveness of the remedy, the plaintiffs because they were dissatisfied with conditions in the proposed renovated facilities. Pending appeal, the First Circuit stayed implementation of the acquisition and renovation remedies, but it refused to stay the order closing the jail:

> We see no reason to issue a stay of the second order. Certainly as far as pre-trial detainees are concerned, the substantive issues of this case have been resolved long

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[3/] The First Circuit later held that the failure to appeal foreclosed the defendants from contesting the court's rulings at a later point. See Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1199-1200 (1st Cir. 1974), cert. denied sub. nom. Hall v. Inmates of the Suffolk County Jail, 419 U.S. 977 (1974).

> ago. In that case it was decided that incarcerating pre-trial detainees at the Charles Street Jail violated the constitutional rights of the detainees and that such incarceration should be halted by June 30, 1976.
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> It is now September, 1977. The district court's order does not go into effect until November 1. Not only have defendants failed to present any evidence that they will suffer irreparable harm pending appeal but on any reasonable balance of the equities involved, it is the plaintiff class whose interests have been kept in legal limbo while the court has attempted to accommodate constitutional requirements with the practical considerations preventing immediate redress. That class cannot be denied its rights interminably.

Memorandum and Order (1st Cir. September 2, 1977) (citations omitted) (J.A. 35-36).

When the merits of the appeal were reached, plaintiffs renewed the effort to obtain agreement on a new facility. Specifically, counsel for the plaintiffs advised the court that, in spite of the unconscionable delay to date in the vindication of plaintiffs' rights, plaintiffs were prepared to agree to a further delay -- in particular, to delay the release of members of the plaintiff class from the Charles Street Jail -- in return for an enforceable commitment by the defendants to adopt and execute a plan providing for the provision of a new facility, within a reasonable period

of time and according to specific criteria. Shortly after oral argument, the court of appeals acted upon this suggestion in a Memorandum and Order which provided, inter alia, as follows:

> During argument, counsel for the Boston City Council, counsel for the Mayor, and counsel for the plaintiffs, all indicated their basic agreement as to the ultimate goal of constructing constitutionally adequate jail facilities. It was stated that within a period of two months, it might well be possible to secure basic agreement of an acceptable plan of action ensuring the prompt construction of such needed facilities.
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> . . .
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> [W]e believe it appropriate . . . to request the parties to meet forthwith, while the appeals remain under submission, and see whether they can agree upon the main ingredients of a plan of action for the construction of adequate jail facilities. These would include an acceptance of both interim and long range goals as to the conditions of confinement within the projected facilities, settlement of a site and target dates for implementation of the plan, and, most important, a good faith commitment to make sufficient funds available when final detailed plans have been approved.

Memorandum and Order (1st Cir. December 15, 1977) (emphasis added) (J.A. 44-47). The court thus stayed the

jail closing order to March 3, 1978 to permit the parties to submit a "constitutionally adequate" plan. Id.

Although the parties began negotiating, by March of 1978 "[n]o agreement was reached." Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 99 (1st Cir. 1978). The First Circuit therefore affirmed the district court's order closing the jail and observed:

> It is now just short of five years since the district court's opinion was issued. For all of that time the plaintiff class has been confined under the conditions repugnant to the constitution.

Id. However, the court decided to give the defendants one final chance to submit "a plan for a new facility including commitments for adequate funding, agreement on a site, projected target dates for the beginning and completion of construction, and an architectural design or written description of the conditions of confinement within the new facility consistent with constitutional standards." Id. at 101. If no such plan was approved prior to October 2, 1978, the jail was to close on that date. Id. at 100-101. No review was sought in this Court.

Faced with an immovable closing date, the defendants finally filed a plan on September 28, 1978, which became the basis for the consent decree that is now before this Court. Plaintiffs supported the plan, and it was approved by the district court on October 2, 1978. As a result, the old jail was permitted to remain in use until completion of the new facility. In approving the plan, the district court emphasized that it provided for single cell occupancy in the

new facility:

> the critical features of confinement, such as single cells of 80 sq. ft. for inmates are fixed, and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions are included.

Memorandum and Orders as to Pretrial Detention, October 2, 1978, (emphasis added) (J.A. 55). The order recognized that a final, more detailed architectural program would be prepared, but noted that "there are unequivocal commitments to conditions of confinement which will meet constitutional standards." Id. (emphasis added) The court ordered the defendants not to deviate from the plan "in any substantial way" without court approval and "without delay [to] take all steps to carry [it] out." (J.A. 58).

B. The Consent Decree

Thereafter, the city defendants submitted a revised and expanded version of the September 27, 1978 plan. The district court referred the matter to a Special Master who, in a series of meetings held in the early months of 1979, assisted the parties in reaching a series of interrelated compromises which came to be embodied in the consent decree. An architectural program was negotiated which established the standards for the new jail. The program was consistent with the previously approved plan, and it provided for single occupancy cells for both male and female detainees.

The Consent Decree was approved on May 7, 1979. It

attached and incorporated the architectural program by reference, with its requirement of single cell occupancy. (J.A. 73, 85-86). Specifically, the decree required the defendants to "construct, maintain and operate" a new detention facility "according to the standards contained in . . . Architectural Program." (Sher. Pet. 16a). In its preamble, the decree noted the desire of all parties "to avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design" and that the attached and incorporated Architectural Program "sets forth a program which is both constitutionally adequate and constitutionally required." (Sher. Pet. 16a). The preamble also included the recognition by the parties of the mutual trade-offs involved: the defendants would be allowed to use the existing facility until a new one was constructed; the plaintiffs would obtain specific minimum criteria for conditions of confinement of future members of the class. (Sher. Pet. 15a-16a). The decree further provided that defendants could not "change or depart" from [the architectural program] in any substantial way except with the assent of the parties or the approval of the Court." (Sher. Pet. 21a). The new jail was to be completed by 1983.

Shortly after the decree was approved, the case was reassigned to Judge Keeton. The design phase then began. In that process, single occupancy became the basic assumption for the entire plan. In particular, the architects relied on the single occupancy feature to assure both safety and privacy by creating individual rooms not subject to surveillance. As ultimately constructed, under this plan, the regular housing cells are designed in modular units. (J.A. 136). Each unit contains two tiers of cells with an

adjacent dayroom, showers, visiting rooms, quiet rooms, and recreational facilities. (J.A. 136). The cells are 70 square feet, with approximately 40 square feet of available floor space. (J.A. 76, 185). The cells have doors, not bars, with a narrow window. (J.A. App. 265). The window provides a wide field of vision from the outside only if the observer is immediately adjacent to the door. Each cell has a toilet and sink unit which is placed near the door at an angle so that the detainee cannot be observed while using the toilet. (J.A. 171). From the control room, where officers are stationed, it is possible to maintain observation only of the dayroom area outside the cells, but not the inside of the cells. (J.A. 170-72, 261).[4/]

C. Subsequent Proceedings Relevant to the Consent Decree

The detainee population increased steadily after entry of the decree.[5/] (Sher. Pet. 10a.) The initial planned

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[4/] Diagrams clearly depicting the viewing limits are included in the record at J.A. 261-64.

[5/] The actual number of male detainees committed to the Sheriff since the Consent Decree has been:

Year	Population	Year	Population
1980	190	1986	321
1981	227	1987	370
1982	281	1988	413
1983	300	1989	408
1984	320	1990	
1985	326	(through February)	371

capacity of the new jail was 309. However, in November, 1982, the Sheriff notified the parties that a larger facility would be required. (C.A. App. 642).

By 1984, plans were completed for the new 309 single occupancy cell jail, but construction had not started and sufficient funding had not been appropriated by the City defendants. On March 9, 1984, counsel for the Sheriff informed the Director of the Public Facilities Department of the City of Boston that the Sheriff would not sign off on the working drawings because a 309 cell jail "would not be adequate to house current or future Suffolk County's pre-trial population." (C.A. App. 644).

On June 8, 1984, the Sheriff moved the district court for an order to permit double cell occupancy in the south wing of the Charles Street Jail. At a hearing on August 6, 1984, the Sheriff argued that, under Bell v. Wolfish, 441 U.S. 520 (1979), he should be allowed to double bunk detainees, since there was an overcrowding problem. The court denied the Sheriff's motion, finding that there were not sufficient grounds to warrant any modification of the single cell occupancy injunction. (C.A. App. 61).

In October of 1984, litigation was commenced before a Single Justice of the Massachusetts Supreme Judicial Court which came to focus on the adequacy of the planned capacity of the new jail. The plaintiffs were intervenors in this action. The Sheriff argued that the planned capacity of 309 was insufficient and proposed, based on state law, that the various state, city and county defendants be ordered to provide a jail with 435 cells to house a detainee

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(C.A. App. 649, 651, 38; J.A. 243).

population of that number. The Single Justice ordered that the larger jail be built, and this order was affirmed by the full bench, which held that under state law, the Mayor and City Council of the City of Boston have the duty to provide a jail of suitable size to accommodate the detainees in conformity with the requirements of the federal consent decree. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E. 2d 361 (1985).

Thereafter, on April 11, 1985, the district court modified the decree to permit the defendants to increase the capacity of the jail by any amount. (J.A. 110). The order was entered with the assent of both the Sheriff and the Commissioner.[6/] (J.A. 133). The order provided that "[n]othing contained in the Consent Decree, however, shall prevent the defendants from increasing the capacity of the new facility if . . . single occupancy is maintained under the design for the facility." (emphasis added) (J.A. 110-111). The order also required that "the relative proportion of cell space to support services will remain the same as it was in the Architectural Program." (J.A. 111). These portions of the order were drawn from the nearly identical language proposed by the Sheriff and the plaintiffs (J.A. 104-09). The order also provided that any modification of the schedule for design and construction ordered by a state court would automatically amend the schedule authorized under the federal order, unless any party objected. (J.A. 112). Thereafter, the state legislature approved funding for the construction of the new jail. St. 1985, c.799. (C.A. App. 335).

[6/] The City councilors objected (on grounds not pertinent here), but did not prosecute an appeal. (J.A. 110, C.A. App. 64).

Following the district court's order of April 1985, the jail population continued to increase.[7/] Despite the increase in commitments, the Sheriff was always able to comply with the single cell injunction which, at the Charles Street Jail, entailed a population limit of 342.[8/] This was accomplished through a number of measures, including the transfer to state prisons of pre-trial detainees who had previously served felony sentences in state correctional institutions,[9/] Superior Court bail reviews conducted by the Bail Appeal Project,[10/] and special Superior Court sessions pursuant to an order of the Supreme Judicial Court. This order provided for comparison and review of bail orders on a county-wide basis, and authorized the selection of selecting suitable detainees for transfer to a halfway house or release on personal recognizance. (C.A. App. 389).

[7/] By 1985, the population already exceeded the number of cells then planned for regular male housing in the new jail. See J.A. 134, 243.

[8/] In 1987, with the consent of all parties, the Sheriff installed sixty modular cells. In 1988, the Sheriff moved for permission to double cell in these units. The court denied the motion, (C.A. App. 595), and the decision was affirmed on appeal. Inmates of the Suffolk County Jail v. Kearney, No. 89-1585 (1st Cir. November 13, 1989) (per curiam).

[9/] These transfers are made pursuant to M.G.L. c.276 §52A. Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1198 (1st Cir. 1974), cert. denied sub. nom. Hall v. Inmates of the Suffolk County Jail, 419 U.S. 977 (1974).

[10/] Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975).

During this period, the Sheriff made no motion to modify the decree. No party suggested that a new design should be considered. Instead, planning continued under the single occupancy model, and ultimately, the facility was constructed on that design. According to the Sheriff's January, 1990 affidavit, he "chose" the "certainty of a new facility" and decided not to seek a change in its design to accommodate a larger population because, in his view, that would have involved "further delay and additional expense to the public." (J.A. 209)

Ground breaking for the new Suffolk County Jail on Nashua Street in Boston took place in September of 1987. The foundation was completed by the Spring of 1988, and construction was completed in the Spring of 1990. The detainees were moved to the jail in late May, 1990. The total male planned capacity at the new jail was 413, an increase of 71 cells over the male capacity at the Charles Street Jail. (J.A. 242, 244-45).[11/]

[11/] The total capacity was 453, with 40 cells allocated for women. Since the opening of the new jail, on account of developments in this lawsuit, the male capacity increased to 419. The district court entered an order which permitted the use of a smaller modular unit for female detainees, rather than the 40 cell modular unit originally allocated to them. As a result, the Sheriff decided to use a 34 cell modular for the women, thus increasing the male capacity by six. See Inmates of the Suffolk County Jail v. Kearney, No. 90-1858 (1st Cir. Mar. 21, 1991).

D. The Sheriff's 1989 Motion to Modify the Consent Decree

On July 17, 1989, when the construction of the jail was nearing completion and it was no longer possible to change the design of the building, the Sheriff moved the district court for modification of the consent decree pursuant to Fed.R.Civ.P. 60 (b)(5) or (6) to allow the double bunking of male detainees in 197 of the jail's 316 regular male housing cells. Under the Sheriff's original proposal, the maximum male capacity would be 610; with 64% of the male population being double bunked.

In the district court, the Sheriff argued that there were certain changes in the law and the facts which required modification. (J.A. 246-48). The changed circumstances cited by the Sheriff were (1) an asserted change in the law, effected by the decision in Bell v. Wolfish, 441 U.S. 520 (1979), which was decided one week after the consent decree was approved by the district court, and which the Sheriff had previously, but unsuccessfully, relied upon to seek an earlier modification of the decree, and (2) an asserted change in operative fact, to wit, increases in the Suffolk County pre-trial detainee population. The Sheriff proposed adding a second, bunk-style bed on top of the existing bed, even though the cells were specifically designed for single occupancy. Those detainees who would be double bunked would be out of their cells for 12 hours per day and locked in their cells for 12 hours per day.[12/] (J.A. 141-43). The Commissioner of Correction

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[12/] In 1989 at the time of the Sheriff's motion for modification, 32% of the population of the jail had been held for more than 60 days and 15% of the population had been held for more than

took no position on the Sheriff's motion -- filing no papers and making no oral argument. (Transcript of Hearing, March 30, 1990).

In their opposition, plaintiffs introduced evidence demonstrating that because the cells were specially designed to maximize privacy for a single occupant, double bunking would present a serous risk to the personal safety of the detainees. Multiple occupancy would inevitably increase tensions and increase the likelihood of violent behavior between detainees. (J.A. 183-89; C.A. App. 881-84). According to the undisputed evidence, it would be extremely difficult to observe or hear altercations between two detainees in a cell because of the layout and design of the cells, the design of the cell door, and the location of the guard's control room. (J.A. 169-73, 260-64). Plaintiffs also submitted an architectural analysis which demonstrated that increasing the capacity by adding 197 detainees would make it impossible to comply with the district court's order to maintain "the relative proportion of cell space to support services" as specified by the architectural program. (J.A. 111, 151-69; C.A. App. 851-55).

In response, the Sheriff contended that the risk of harm to the detainees could be reduced by a classification system for selecting detainees "suitable" for double bunking. (J.A. 143). But in the views of plaintiffs' experts, a classification plan could not materially affect the risk, particularly since in a pre-trial setting little background information is available and since, under the Sheriff's proposal, 64% of the population would be double bunked.

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120 days. (C.A. App. 653; Sher. Pet. 10a).

(J.A. 187-89). The Sheriff's expert conceded that "at present there is no fully reliable way of predicting an inmate's behavior toward his fellow inmates." (C.A. App. 704). His conclusion, however, was "that double bunking at the Nashua Street Jail will not pose a significantly increased risk of violent or assaultive behavior between cellmates." (emphasis added) (C.A. App. 706).

Plaintiffs' architectural expert also addressed the question of when the design of the jail could have been changed to accommodate a larger capacity. The uncontradicted evidence was that changes could have been made at any point prior to April 1988, when the foundation was completed. (J.A. 174-76). The architect also analyzed whether there was any way to expand the capacity of the jail at the Nashua Street site without double occupancy. He concluded that as many as 48 modular cells could be installed in the rear yard without interfering with the jail's fire safety and emergency evacuation plan and would necessitate only the relocation of sixteen staff parking spaces. (J.A. 236, 266-69).

The district court took a view of the Nashua Street Jail on March 9, 1990 and made a close inspection of the entire facility. (C.A. App. 69). After a hearing, the district court denied the Sheriff's motion for modification of the decree. (Sher. Pet. 13a). The court found it unnecessary to decide whether double celling in the new facility would be unconstitutional, (Sher. Pet. 12a), since it concluded that modification was not warranted in any event.

First, the court considered whether the Sheriff had met the test for modification set forth in United States v. Swift

& Co., 286 U.S. 106, 119 (1932). Applying this standard, the court found no basis for relief since neither the factual nor legal changed conditions advanced by the Sheriff were new or unforeseen. The court found that Bell v. Wolfish "did not directly overrule any legal interpretation on which the 1979 consent decree was based." (Sher. Pet. 10a). Rather, the court held, the consent decree constituted "an agreement by all parties to avoid the risks of litigation involved in pressing for a judicial determination on the issue of constitutionality." (Sher. Pet. 13a). The court found that the increase in detainee commitments "has been an ongoing problem during the course of this litigation, before and after entry of the consent decree." (Sher. Pet. 10a).

Second, the court noted that "this motion was not filed until July 1989" even though "there has been a marked upward trend in the number of inmates held in the Sheriff's custody since 1985." (Sher. Pet. 11a).

Next, the court considered whether the Sheriff had presented sufficient grounds for modification under the "flexible" standard advocated by him. Applying this standard, the court still concluded that "modification would not be appropriate." (Sher. Pet. 12a). Specifically the court found that:

> [t]he proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards. A separate cell for each detainee has always been an important element of the relief sought in this

> litigation -- perhaps even the most important element. Plaintiffs have been willing on more than one occasion to make concessions and accept delays in order eventually to obtain the elements of relief they considered essential. The type of modification sought here would not comply with the overall purpose of the consent decree; it would set aside the obligations of that decree. (Sher. Pet. 12a).

The Sheriff and the Commissioner of Correction appealed. The First Circuit, in a per curiam opinion, affirmed, stating "we are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further." (Sher. Pet. 2a).

SUMMARY OF THE ARGUMENT

The argument of petitioner Commissioner of Correction that a governmental defendant has the perpetual right to withdraw consent to a decree in order to litigate its validity, at will, is without any legal support and is contrary to basic principles of finality. If the right were recognized, it would effectively eliminate the consent decree as a viable method of resolving litigation with governmental entities. No rational party would ever agree to a decree which the other party is free to disavow at any time. Ironically, by mandating adversary adjudication, the petitioner's formulation would increase federal judicial involvement in the affairs of states and localities, precisely the kind of incursion on federalism that petitioner professes to oppose.

Therefore, the district court correctly held that a governmental official seeking to modify a consent decree to avoid an obligation must make a showing, under Fed. R. Civ. P. 60(b)(5), of circumstances which render it "no longer equitable that the judgment should have prospective application." Such a standard must provide assurance to negotiating parties that consent decrees will not be nullified absent truly exceptional circumstances. Thus, a moving party must establish, at the least, that (1) the "new" circumstance was not foreseen and not reasonably foreseeable, since the court must determine whether application of the decree in current circumstances actually was part of the original bargain; (2) the motion is timely (that is, made when the need first becomes apparent) and consistent with a good faith effort to comply with decree obligations; (3) the proposed modification is equitable to the decree beneficiary, considering the intended benefits of the basic bargain and the concessions made and already carried out; (4) the modification is necessitated by substantial governmental interests and is the least drastic alteration of the decree needed; and (5) modification is not likely to lead to another violation of law.

The district court's refusal to modify this decree should be affirmed because it correctly determined that petitioner Sheriff had not made a minimum showing. There is surely no abuse of discretion, which is the governing standard of review. The only factual change relied on by petitioners is an increase in the jail population, but that was foreseen long before the Sheriff ever sought this modification, at a time when changes in the design in the jail could have obviated the problems that petitioners now claim as their justification and eliminated the resultant harm to the plaintiff class.

Nor was there any change in the law. The case relied on by petitioners, Bell v. Wolfish, 441 U.S. 520 (1979), was sub judice in this Court while the decree was being negotiated, was decided just days after the decree was entered, and ten years before the Sheriff made his most recent motion to modify. Furthermore, that decision by no means dictates the relief he seeks since it specifically recognizes the fact-bound nature of every inquiry dealing with the legality of conditions of detention.

Modification would also be extremely inequitable to the plaintiff class who waited for more than ten years for a new jail, enduring unacceptable interim conditions in exchange for long-term benefits. Now that plaintiffs have carried out their part of the bargain, defendants seek to drastically modify theirs by eliminating the single most important element of the decree -- single celling. Indeed, given the unique design of the new jail, double celling in smaller units, with no ability of jail officials to monitor cells to assure safety, without a modicum of privacy in cramped conditions for 12 hours a day, inmates would, in crucial respects, be worse off in the new jail than in the old one, which everyone agreed had to be torn down. Petitioners have thus also failed to show that modification of the decree will not lead to an unreasonable threat to the personal security of the detainees and thus violate their rights to due process of law.

The judgment should be affirmed. Alternatively, the Court should remand for further consideration by the district court in light of current circumstances, including changes since the hearing on the motion in March, 1990.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT A PARTY SEEKING MODIFICATION OF A CONSENT DECREE MUST MAKE A SHOWING OF CIRCUMSTANCES DEMONSTRATING THAT "IT IS NO LONGER EQUITABLE THAT THE JUDGMENT SHOULD HAVE PROSPECTIVE APPLICATION," AS PROVIDED BY RULE 60(b)(5).

A. The Petitioners Are Not Entitled To Attack The Consent Order Entitled to On the Sole Ground That It Is Not Legally Required.

The district court ruled that a county government official seeking modification of a consent decree is not entitled to be excused from a previously agreed-upon obligation solely on the ground that the order to which he consented is not actually compelled by the Constitution. (Sher. Pet. 12a-13a). Rather, Judge Keeton held that, consistent with the plain language of Fed. R. Civ. P. 60(b)(5)(3d clause), the moving party must also establish that "it is no longer equitable that the judgment should have prospective application."

In this Court, petitioner Commissioner of Correction contends that this rule does not apply when "governmental defendants have withdrawn their consent." (Comm. Brf. at 44). According to his theory, a governmental defendant has the unfettered and permanent right to withdraw its consent to any provision of a consent decree in order then to litigate whether the remedy is now independently

required by the Constitution. In the Commissioner's view, the right of a government official to collaterally attack a consent decree may be exercised at any time and without any showing of equitable circumstances whatsoever. In this case, the Commissioner withdrew his consent only on appeal, after Judge Keeton had already denied modification.

The Commissioner argues first that no order which is not affirmatively required by federal law can be enforced by a federal court. He contends that the single cell occupancy order is not required by the Constitution. Therefore, he argues, the refusal of the district court to relieve the Sheriff of the obligation exceeds the scope of federal judicial power. See Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971); Milliken v. Bradley, 418 U.S. 717, 744 (1974).

The district court did not reach the constitutional issue,[13] and the parties disagree as to it.[14] However, even assuming that the order is not constitutionally required, the Commissioner's argument is flawed because it overlooks the most fundamental principles of finality in litigation. This Court has held that a final judgment is not open to review on the merits other than by way of direct appeal. Otherwise there would be no end to litigation. Ackermann v. United States, 340 U.S. 193, 198 (1950); Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 271 (1978). The interest in finality is so strong that it even applies to judgments upholding sentences of

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[13] Sher. Pet. 12a.

[14] See Section 5 at p. 49, infra; C.A. App. 557-58.

death. McCleskey v Zant, 111 S.Ct. 1454, 1469 (1991).

Petitioner contends, however, that the order here should not be treated with similar final effect since it was not the result of an adjudication but was entered by consent. The argument is that since the parties to a lawsuit cannot agree to create or extend the limited jurisdiction of a federal court, they likewise cannot contract with each other to create power to enter an order which otherwise would not exist. However, this issue was resolved in Local 93, Int'l. Ass'n. of Firefighters v. Cleveland, 478 U.S. 501 (1986). In that case the Court upheld the entry of a consent decree providing for injunctive relief against municipal officials, over the objection of an intervenor, even though the decree "provide[d] broader relief than the court could have awarded after a trial." Id. at 525. Under Local 93 a consent decree may be approved if it (1) "spring[s] from and resolves a dispute with the court's subject matter jurisdiction; (2) "'come[s] within the general scope of the case made by the pleadings;'" (3) "further[s] the objectives of the law on which the complaint was based"; and (4) is not actually prohibited by federal law. Id. The consent decree in this case meets all of these criteria. Indeed, the case for upholding the decree here is even stronger. In Local 93 the parties and the district court knew in advance that the relief consented to was otherwise beyond the power of the court to grant after trial because it was specifically prohibited by statute. Here, by contrast, the issue of whether pre-trial detainees were legally entitled to single occupancy, as a matter of constitutional law, was

very much in dispute when the decree was negotiated.[15/] Nor did Bell v. Wolfish, 441 U.S. 520 (1979), decided after the entry of the decree, hold that the relief was prohibited. It held only that single occupancy was not constitutionally compelled on the facts of that case, as the United States properly recognizes in its brief. (U.S. Brf. at 20, n.9).

Alternatively, the Commissioner argues that even if a federal court may sometimes enforce a consent decree that goes beyond what is legally required, this Court should recognize a special right of a governmental official to withdraw consent. Local 93, he claims, did not dispose of the question since it dealt only with entry of the decree and not modification. (Comm. Brf. at 43-44). Accordingly, he argues, even if the decree might have been valid when entered, it became invalid as soon as consent was withdrawn. The Commissioner argues that this right is compelled by principles of federalism since, otherwise, consent decrees would permit public officials permanently to bind successors and other branches of government, even though these officials could not otherwise do so under state law. This, it is said, would interfere with the state democratic process.

There is no merit to this argument, for several reasons. First, consent decrees bind successors and non-parties to no greater extent than do adjudicated decrees, as to which

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[15/] The state of the law in the First Circuit in 1979 was set forth in Feeley v. Sampson, 570 F.2d 364, 370 (1st Cir. 1978). In Feeley the First Circuit rejected the "strict scrutiny" method of analysis which had been utilized by Judge Garrity in this case, but it specifically avoided any comment on the Inmates result.

the principles of finality indisputably apply. Certainly where, as here, the consent decree represents a settlement of a disputable issue, it constitutes no greater offense to federalism principles than a litigated decree which could have followed a failure to settle. Here, Judge Garrity did in fact rule that single occupancy was a "critical" feature of the plan for the new facility; this was an indispensable component of his approval of the plan. (J.A. 55). Had petitioner submitted a plan for multiple occupancy and failed to appeal its rejection, the posture of the case would in effect have been the same, yet there would be no argument that principles of finality do not apply.

Second, the government officials in this case were fully authorized under state law to commit to single occupancy when they agreed to the 1979 decree and to the 1985 modification. They exercised that authority in the most public and arms-length manner imaginable -- in the forum of the court of appeals and in proceedings before the Special Master. Under state law, the Sheriff has "custody and control of the jails in his county and shall be responsible for them." M.G.L. c.126, §16. The Mayor and the City Council have the obligation to provide a "suitable jail." M.G.L. c. 34, §§3, 14. This duty is mandatory and enforceable. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E.2d 361 (1985). The Commissioner himself has the power under state law to bind a Sheriff and his successors; he may require county facilities to be designed and operated according to a single occupancy plan -- and has done so in the past.[16/] Furthermore, throughout this litigation the Commissioner has been represented by the Massachusetts

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[16/] M.G.L. c.34, §14; see, e.g. J.A. 53.

Attorney General, who has the authority under state law to conduct and settle litigation. See M.G.L. c.12, §3; Feeney v. Commonwealth, 373 Mass. 359, 366-67, 366 N.E.2d 1262, 1266-67 (1977). In any event, it is in the very nature of designing a building that certain choices must be made which become irreversible once the structure is built. In that sense, the designer necessarily binds not only successors but everyone.

Third, the petitioner's idea, if adopted, would make it virtually impossible to resolve litigation against governmental entities in any way short of adversary adjudication. Equity cases are settled by equitable relief, to wit, by consent decrees. A consent decree which one party is free to disavow has nothing to recommend it and will settle nothing. As Judge Keeton observed, to allow a party to withdraw consent and challenge the decree on the merits:

> would make settlements in cases of this type worth very little. It would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to became more burdensome than expected. It is the very certainty and finality of a consent decree approved by the court that induces participation in it.

(Sher. Pet. 12a). In fact, except in cases of collusion, there would virtually never be a good reason for a rational plaintiff to enter a consent decree. A court order which requires a defendant to comply only when he wishes to do so is utterly unnecessary. Such a decree would not be

worth making any concessions to obtain. And by entering such an arrangement a plaintiff would cede to the defendant the ability to control the litigation, and to chose the time and context in which the plaintiff will be called upon to make the necessary record justifying relief on the merits.

In effect, therefore, petitioner's proposal would eliminate the prospect of settlement with government entities in equity cases. Yet even he does not suggest that this would be a good idea. Perhaps it belabors the obvious to state that it plainly would not. No rational system of dispute resolution places settlement beyond its reach. Indeed, there is a strong policy in favor of settlement of cases in federal court. See Local 93, 478 U.S. at 517; Evans v. Jeff D., 475 U.S. 717, 733-34 (1986); Marek v. Chesny, 473 U.S. 1, 10 (1985); Delta Airlines v. August, 450 U.S. 346, 363 (1981).

Settlement conserves judicial resources and frequently offers better, more satisfactory and finely tuned relief. Consent decrees are especially vital in the settlement of cases concerning the ongoing administration of complex enterprises. In such cases consent decrees provide the parties with the opportunity to participate in the drafting of the court's injunction, and thus most effectively to mould relief according to their true needs and interests. Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L.Rev. 1281, 1299 (1979). As a general matter, this feature ensures greater sensitivity and deference to the legitimate public policy concerns of governmental defendants than does adversary judicial resolution. Thus, consent decrees tend to minimize intrusions into governmental discretion and in this way uphold the values

of federalism.

This case graphically demonstrates why parties must have the ability to settle cases by consent decree. In 1978-79, had the defendants not been able to make a binding commitment as to the planned features of confinement, there could never have been a negotiated resolution to the impasse which had developed and there would have been far more serious and harmful consequences than any now hypothesized. In that event, the First Circuit would not have permitted further use of the old jail, 573 F.2d at 101, and the district court would have had no choice but to close the jail, and possibly to order use of an interim facility of its own design as well. Id. Instead, the parties were able to negotiate a consent decree that better satisfied their needs than any adjudicated resolution could have done. The plaintiffs exchanged further delay for the certainty of specified relief; the whole point of the consent decree was to fix conditions of confinement in the form of an enforceable commitment. In return, the defendants obtained an eleven year extension of the life of a concededly unconstitutional facility and, except for those features specifically fixed, retained overall control over the design of the facility. See Missouri v. Jenkins, 110 S. Ct. 1651, 1663 (1990) (directing local government institutions to devise remedy is preferable to court implementing its own).

B. Rule 60(b) Requires A Showing of Equitable Circumstances.

The nature of the equitable showing necessary to warrant modification is determined directly by the nature of the consent decree. A consent decree "ha[s] attributes

of both contracts and of judicial decrees." United States v. ITT Continental Baking, 420 U.S. 223, 235-37 (1975). It is of a "dual" or "hybrid" nature. ITT Continental Baking, 420 U.S. at 236; Local 93, 478 U.S. at 519. As part contract, it draws upon contract law for the most elementary and venerable of common law principles: that parties enter certain transactions only if they know that the law will enforce their settled expectations. Local 93, 478 U.S. at 519; United States v. Armour & Co., 402 U.S. 673, 681 (1971); ITT Continental Baking, 420 U.S. at 236. Each party is willing to give something in return for the undertaking of the other precisely because the law permits it to rely upon formal, bilateral undertakings. This is both the theoretical and practical justification for contract law. (cote) At the same time, the consent decree is a court order and an exercise of the court's equitable power. The undertakings of the parties are therefore necessarily tempered by the court's power to do equity, both when the order is entered and when it is enforced. United States v. Swift & Co. 286 U.S. 106, 115 (1932).

The precise showing of equitable circumstances must, accordingly, be finely calibrated to maintain this very duality of the consent decree: to preserve the incentive to enter into consent decrees, but to make it possible to undo a particular obligation when certain unforseen or exceptional circumstances render oppressive its continued enforcement.

If the showing is too weak, plaintiffs will be reluctant to settle cases by consent decree. And defendants will be too eager to enter them, in the hopes that concessions can be obtained from plaintiffs, with the correlative obligations avoidable at a later date. Those decrees which are entered

will be subjected to endless litigation, whenever a dissatisfied party finds it slightly more difficult to comply. In cases involving government programs and institutions, the consent decree typically is the fruit of a complicated negotiation in which agreement is reached on hundreds of issues, as the result of a series of interdependent mutual concessions. Consent decrees are typically long and complicated; once they start to unravel, it is hard to know where to stop. In such cases, courts considering excusing one party from complying with any one provision, will face the daunting task of identifying and modifying the many dependent provisions as well.

On the other hand, a legal requirement of a strong showing need not deter defendants from negotiating settlements. If necessary, the parties can always agree in a consent decree that modification will be governed by a more flexible standard for modification than the law customarily provides.

For these reasons, a district court must employ a presumption against modifying a consent decree, Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1124, 1162 (1986); Twelve John Does v. District of Columbia, 861 F.2d 295, 298, (D.C. Cir. 1988) ("extraordinary remedy"); Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d 1114, 1119 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980) (same). Under Rule 60(b)(5), the party seeking modification must shoulder the burden of establishing equitable circumstances compelling relief. Badgley v. Santacroce, 853 F.2d 50, 54 (2d Cir. 1988); Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1120; Lubben v. Selective Service System, 453

F.2d 645, 651 (1st Cir. 1972). Moreover, the party's burden must be stated in objective and specific terms. A standard permitting modification upon the basis of vague or subjective criteria would create the very incentives for collateral attack which a showing of equitable circumstances is designed to avoid. A court should especially not place controlling weight on the application of an amorphous term, such as the "public interest," as to which one party to the litigation (here, the government defendant) claims an exclusive power to interpret. To be sure, the public interest must be accommodated, but this is better accomplished through the application of an objective standard designed to effectuate that concern. In short, the legal standard must be articulated in such a way that a negotiating party will know that its negotiating partner will not be relieved of performance absent truly extraordinary and unforeseen circumstances.

For well over a half-century, the standard governing modification of both litigated and consent decrees has been that articulated by United States v. Swift & Co., 286 U.S. 106 (1932). According to the Swift formulation,

> The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119. This standard, of course, amply satisfies the function of preserving the benefit of the bargain since under it modification is rarely granted and then only for a "clear showing of grievous wrong." Id.

The petitioners and the United States as amicus curiae argue strenuously that the Swift standard sets too high a threshold in "public law" or "institutional" cases and they urge various formulations of a more flexible standard for modification. (Sher. Brf. at 15; Comm. Brf. at 55; U.S. Brf. at 13-20). The Court declined to employ the Swift standard in Board of Education v. Dowell, 111 S.Ct. 630, 636 (1991), which involved a litigated decree. The Court may well conclude that modification of a consent decree on something less than a showing of "grievous wrong" can safely be permitted without doing violence to the expectational needs of the negotiated decree. But the Court should proceed cautiously in adjusting the standard, especially since any substantial weakening will have consequences for a wide array of lawsuits. Plaintiffs, in general, will claim at least comparable ability to reopen compromises, on the basis of new circumstances or new law. And state and local defendants will assert greater rights of modification against the federal government as well.[17/]

[17/] Apparently because it recognizes the harmful consequences of too flexible a standard, the United States suggests that when federal officials sue state and local officials, "[t]he requirements of federal supremacy would support a stringent modification test." U.S. Brf. at 28, n. 17. However, Article VI of the

In any event, if the Court does chose to employ a standard less rigorous than the Swift formulation, it will still be essential to hold the moving party to certain minimum criteria designed to preserve the integrity and efficacy of the consent decree remedy. In the absence of the Swift "clear showing of grievous wrong," a party seeking to avoid a consent decree obligation,[18] must establish each of the following:

First, the party must show that the circumstances said to warrant modification were not within the reasonable contemplation of the parties when they made their agreement and could not reasonably have been anticipated. Nelson v. Collins, 659 F.2d 420, 427 (4th Cir. 1981); Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d 1114, 1124 (3d Cir. 1979) cert. den. 444 U.S. 1026

Constitution establishes the supremacy of federal law, not of federal officials. The modification issue arises, by hypothesis, only when defendants assert that the consent order is not required by federal law. Thus there is no basis for concluding that federal officials would enjoy any different standard. If there is any difference, consent decrees which resolve claims of individual rights under the Constitution should be treated with greater deference than consent decrees, entered in cases in which federal agencies have sued under federal statutes.

[18] The formulation of the standard here is directed to the request of an obligor to avoid an obligation. It is not addressed to a request by a beneficiary for more extensive relief in order to achieve the asserted purpose of the decree. See United States v. United Shoe Machinery Corp., 391 U.S. 244, 249 (1968) (requiring modification); Firefighters Local Union 1784 v. Stotts, 467 U.S. 561, 576-79 (1984) (disapproving modification).

(1980). In other words, the "new" circumstance must have been unforeseen and unforeseeable. If the parties agreed that a provision of the decree would govern even if a particular circumstance arises in the future, then that circumstance, when it does arise, cannot possibly form the basis for modification.[19] Otherwise, the standard would permit the party simply to renege on the very promise he made. For this reason, virtually every formulation of a more flexible standard for "institutional" cases advanced in the lower courts has required that the modification not be in derogation of the essential purpose of the decree. Badgley v. Santacroce, 853 F.2d 50 (2d Cir. 1988); Plyler v. Evatt, 846 F.2d 208 (4th Cir.), cert. denied, 488 U.S. 897 (1988); Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 968-69 (2d Cir.), cert. denied, 464 U.S. 915 (1983); Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1120; and Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L.Rev. 1020, 1037 (1986).

Second, the proposed modification must be sought in timely fashion and in good faith. Rule 60(b) specifies that "[t]he motion shall be made within a reasonable time." "What constitutes a 'reasonable time' must be determined in the light of all the circumstances of the case." Moore's Federal Practice, ¶60.26 at 243. "The courts consider

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[19] "If parties to a consent decree explicitly contemplated the possibility of a change in the law or of legally relevant facts and conducted their negotiations in the face of that possibility, a court addressing subsequent changes favorable to one of the parties ought to be reluctant to grant that party's request for modification." Jost, 64 Tex. L. Rev. at 1125.

whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party has some good reason for his failure to take appropriate action sooner." Wright and Miller, Federal Practice and Procedure, §2866 (citations omitted). See also Matter of Whitney Forbes, 770 F.2d 692, 697-98 (7th Cir. 1985) (consideration of prejudice and reason for delay); Jones v. City of Richmond, 106 F.R.D. 485, 487, n.2 (E.D. Va. 1985) (consideration of prejudice). Furthermore, a showing of good faith is necessary to assure that an alleged predicate circumstance was not actually within the control of the moving party and is not simply a pretext to void an obligation. Plyler v. Evatt, 924 F.2d 1321, 1324, 1327 (4th Cir. 1991); Newman v. Graddick, 740 F.2d 1513, 1521 (11th Cir. 1984); Nelson v. Collins, 659 F.2d at 429; Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1121.

Third, the modification must be equitable to the plaintiffs in light of the concessions made by them. Plyler v. Evatt, 924 F.2d at 1324; Carey, 706 F.2d at 967-69. When a defendant is permitted to avoid a promise, the plaintiff must be relieved of its correlative undertaking. It is generally not equitable for a party to evade an obligation after he has already enjoyed the concessions made in exchange, especially if these concessions no longer can be withdrawn. Under traditional principles of equity, rescission of an agreement cannot be obtained where the court is unable to restore both parties the status quo ante.[20] New York Mail & Newspaper

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[20] This is acknowledged even in the most radical proposal for modification of consent decrees. See McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from

Transportation Co. v. United States, 139 Ct. Cl. 751, 154 F.Supp. 271, 276 (Reed, J., sitting by designation), cert. denied, 355 U.S. 904 (1957).

Fourth, equity requires that the beneficiary of a consent order be deprived of a negotiated benefit only to the extent necessitated by some substantial governmental interest. There must be a clear nexus between the predicate circumstance and the inability or impracticability of complying with the decree. See, e.g., Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1120. A temporary crisis may justify temporary relief, but an ephemeral problem would not support permanent elimination of a bargained-for protection. Plyler v. Evatt, 924 F.2d at 1328-29). There must be no feasible alternative to the proposed modification which preserves the original relief. Plyler v. Evatt, 924 F.2d at 1328; Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1121.

Fifth, the movant must show that the proposed modification will not result in a constitutional or other federal law violation. See, Board of Education v. Dowell, 111 S.Ct. 630, 637. Apparently, all parties agree on the necessity of this showing. (Sher. Brf. at 32; Comm. Brf. at 30).

Political Change, Chi L. Forum 295, 305 (1987) (When the government obtains modification, a private party "must be freed of [its assumed] obligations, just as the government is freed of its obligations. Moreover, if the private party has suffered any concrete loss, the government is required to make it whole.")

II. THE DISTRICT COURT PROPERLY DENIED MODIFICATION SINCE THE SHERIFF DID NOT ESTABLISH A MINIMUM SHOWING OF EQUITABLE CIRCUMSTANCES JUSTIFYING THE RELIEF SOUGHT.

Appellate review of a district court's decision to modify or to deny modification of a consent decree is for abuse of discretion. Browder v. Director, Dept. of Corrections, 434 U.S. 257, 263, 263, n. 7 (1978). An appellate court must accept any findings of fact which are not clearly erroneous. Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2458 (1990).

These principles are fundamental. A trial judge who has presided over enforcement of a decree for many years is in the best possible position to find the facts, to evaluate asserted needs, and to balance the equities. The trial judge is best able to appreciate the meaning and relative importance assigned by the parties to various provisions of the decree, in light of the conduct of the parties over time. Similarly, the trial judge is best able to measure the good faith of the moving party. Cooter & Gell, 110 S.Ct. at 2459-60; Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). And here, as in Hutto v. Finney, 437 U.S. 678, 688 (1979), the exercise of discretion is entitled to "special deference" in view of Judge Keeton's long years of experience, patience, and demonstrated sensitivity to the limits of federal judicial power, the proper role of the state courts, and the legitimate interests of the defendants.

Judge Keeton held that the Sheriff did not present equitable circumstances which justify modification under

either the Swift standard or the more lenient "flexible" rule advocated by him. (Sher. Pet. 11a, 12a). The decision was well within the court's discretion -- and was clearly correct. In fact, the Sheriff's case founders upon each and every of the requirements for modification discussed above:

1. The circumstances advanced to justify modification were well within the contemplation of the consenting parties, could have been and indeed were reasonably anticipated. The particular provision of the consent decree under review here represented the negotiated final resolution of the central legal issue remaining in the case, with full awareness both that the issue could be disputed and that the population might rise.

a. The asserted change of law

The first alleged circumstance was a purported change of law announced by the decision of this Court in Bell v. Wolfish, 441 U.S. 520 (1979). However, the district court concluded that this decision did not constitute the kind of change in law sufficient to justify modification. (Sher. Pet. 10a). Bell does not prohibit the relief. It did not hold that double celling is per se constitutional, much less that single occupancy offends some federal statutory or constitutional policy. Compare, System Federation No. 91 v. Wright, 364 U.S. 642, 647 (1961). As we show below, under Bell, the constitutional issue depends upon a thorough and searching development of the facts.

Petitioners' contention, instead, is that under Bell the plaintiffs would not be entitled to the relief, if the issue were litigated on its merits today. But even assuming that

this were so,[21] Bell did not represent any change in law at all. At the time the decree was negotiated, the law of the First Circuit on the issue of single occupancy was unsettled.[22] And, during the entire course of the negotiations, Bell was literally sub judice in this Court.[23] When parties agree to settle a legal issue which they know can go either way, they can hardly complain when, inevitably, the issue is resolved one way or the other in another case. Cf. Airline Pilots Assoc. v. O'Neill, 110 S.Ct. 1124, 1136 (1991) ("A settlement is not irrational simply because it turns out in retrospect to have been a bad

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[21] But see Section 5, at p. 49, infra.

[22] Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978). See note 15, supra.

[23] In an article upon which petitioners place extremely heavy reliance, Professor Jost predicted this case:

> Modification [based upon a contemplated change in law] threatens the bargain the parties struck and the reliability of future consent decrees. For example, a class of prisoners may have extracted from the state a commitment to abolish double-celling in exchange for abandoning other claims regarding prison overcrowding or security. A subsequent Supreme Court decision holding double-celling constitutional in some circumstances does not justify modification of the decree to deprive the prisoners of this hard-won benefit. Unless changes in the law render the original decree illegal, modification of consent decrees to conform to legal changes contemplated by the parties in negotiating the decree should rarely be granted.

Jost, 64 Tex. L. Rev. at 1135-36.

settlement.") (emphasis in original).

Moreover, as Judge Keeton found, the agreed upon standard of single occupancy represented "one of the primary purposes of the decree." (Sher. Pet. 12a). There is no ambiguity here about what the parties intended. Compare Pasadena City Board of Education v. Spangler, 427 U.S. 424, 438, (1976). There were two essential components, each of which is directly implicated by the motion to modify. First, the overall purpose of the decree was to achieve certainty and reliability in the conditions of the new jail: to avoid further litigation as to what features would be included and to incorporate these specific elements in an enforceable form. Given the context, the characterization by the petitioner Commissioner, Comm. Brf. at 46-47, of the consent decree as no more than an open ended agreement to create constitutional conditions -- whatever they may turn out to be -- is disingenuous in the extreme. In 1978, the plaintiffs had already possessed just such a promise for five years, with no fulfillment in sight. The entire point of the consent decree was to actualize the promise and to provide a commitment on specifics which could be relied upon -- that is, to prevent the very thing which petitioners would now do: make a critical change too late in the day to readjust.

Second, within this framework, single occupancy was the key, bargained-for item of relief. For twenty years single occupancy has been the central focus of the lawsuit. For ten years it has been the core feature of the design of the new jail. Plaintiffs have consistently sought this relief from the beginning. They prayed for it in the original

request for relief after trial,[24] and still again after while the case was under advisement,[25] after a prisoner was clubbed to death by his cellmate. (Sher. Pet. 27a). Judge Garrity singled out the "unequivocal commitment" to single occupancy as a "critical feature" of the defendants' plan for replacing the jail, which led him to delay closing the old jail. (J.A. 55). Plaintiffs obtained the relief in the consent decree and, again, in the consented-to modification in 1985.[26] All tolled, plaintiffs agreed upon what amounted to a staggering delay in implementation in order to obtain this relief -- 17 years from entry of the original judgment, 10 years from the entry of the consent decree. Plaintiffs made other, substantive, concessions as well, including a reduction in the area per cell.

Most importantly, single occupancy became the linchpin of the design of the jail. All of the other aspects of the jail design, affecting the safety and privacy of the occupancy of the cells, were directly premised upon this design. In every sense, then, the single occupancy requirement was the very essence of the bargain.

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[24] Plaintiffs' Proposed Order, June 30, 1972, at ¶s2, 4.

[25] Plaintiffs' Motion to Reopen Proceedings, July 20, 1972.

[26] Plaintiffs also successfully opposed two attempts by the Sheriff to modify the single cell order at the old jail -- one in 1984 to double bunk detainees in the south wing of the jail and the other in 1989 to double bunk detainees in the modular cells. See p. 11 and note 8, supra.

b. The asserted change in fact.

It was similarly understood at the time the consent decree was negotiated that the jail population was subject to increase, even if specific population rises could not be predicted. As Judge Keeton found: " [i]t has been an ongoing problem during the course of this litigation, before and after entry of the consent decree." (Sher. Pet. 10a-11a). It is true, as petitioners point out, that the original consent decree provided for a 309 prisoner population -- and thus the increase noted by Judge Keeton in April 1985 was "unanticipated." (J.A. 110). But the precise size of the jail had never been an essential element of the agreement. Neither the plaintiffs nor the court have ever had any interest in how large the jail was -- so long as the conditions were according to the agreed standards. Thus when, in 1984, it became clear that the facility was too small, the Sheriff initiated state court litigation seeking to obtain a larger facility -- on the express premise that each additional inmate would require an additional room. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 626, 477 N.E.2d 361 (1985).

But most significant of all, in 1985 the decree was modified, again by consent, to permit the defendants to build a jail of any size, provided, expressly, that single cell occupancy was maintained. (J.A. 110). This consented-to modification is dispositive of the issue here, for two reasons. First, it establishes explicitly that the single cell occupancy requirement is and was not intended to be tied to the size of the population in the decree. Second, it demonstrates beyond any doubt that at least by 1985, when the single occupancy order was reiterated and strengthened, all parties were well aware that the

population was in fact likely to rise -- this was the whole idea of modifying the decree to make the capacity of the jail an open-ended feature.

2. Modification was not sought in timely fashion. Bell v. Wolfish was decided seven days after the original decree was entered. It was unreasonable for the Sheriff to wait for ten years, particularly after reaffirming the single cell provision in 1985, to assert for the first time that Bell was a "new" circumstance requiring relief. And it was manifestly unreasonable for him to wait until after the design features of the new jail were unchangeable -- and even built.[27/]

Similarly, as to the rise in population, the district judge found that there was a "marked upward trend in the numbers held in the Sheriff's custody since 1985." (Sher. Pet. 11a). It was unreasonable for the Sheriff to wait until the design of the facility could no longer be changed or its capacity increased. Indeed, the Sheriff has conceded that he deliberately "chose" not to make such a motion in at a time when the jail still could have been redesigned -- either to add more rooms, or to change the configuration. (J.A. 208). This decision can hardly be characterized as in keeping with a good faith effort to fulfill his decree obligations and was calculated to render the "need" to double-cell a self-fulfilling prophecy.

3. There is no way to relieve the plaintiffs of the

[27/] The Commissioner, of course, never moved the district court to modify and never even supported the Sheriff's motion in the district court. His first request for relief was made when he appealed the denial of the Sheriff's motion.

correlative burdens which they assumed under the decree. The initial, general consideration for the consent decree was a further delay in confinement under unconstitutional conditions beyond October 1978. As it turned out, the delay was eleven years. The Sheriff pressed his motion only when plaintiffs' undertakings were fully discharged, but before his own had even begun.

Moreover, the single cell occupancy requirement was the core feature of the design of the new facility. The entire housing scheme was based upon this assumption. Most importantly, the architects utilized this feature to develop a unique plan to insure privacy for the detainees. Unlike the plan of virtually every other jail in the United States, the plan here -- involving the configuration of the individual cells, the design of the cell doors and windows and the layout of the cells within the housing units -- was to minimize visual observation of the interior of the cell and thus to maximize privacy. The indispensable premise of this design was that use of each cell was to be by no more than one detainee. Similarly, the cell size was set at half the Massachusetts minimum for double occupancy.

105 C.M.R. §§450.321[28]; 103 C.M.R. §972.03(2)[29]. Indeed, relying upon the single occupancy guarantee, plaintiffs agreed to a reduction of the 80 square foot design contained in the original plan. (See J.A. 55). Obviously, placing two detainees in this type of cell would create dangers not even present in the old facility. The result of utilizing this unique single occupancy design for double occupancy would convert the very reforms promised by the decree into instruments which threaten the safety and destroy the privacy of the detainees. In a real sense, the detainees would have received the "worst of both worlds."

4. Notwithstanding the hyperbole in their briefs, the petitioners have never demonstrated that modification is needed to accommodate the Suffolk County Jail population or that, even if an increase in capacity is needed, there are no feasible alternatives to the permanent dismantlement of the carefully negotiated agreement of the parties.

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[28] 105 C.M.R. §450.321 provides that:
Each cell or sleeping area in a new facility or a part of a facility constructed or renovated after the effective date of these regulations contains at least 80 square feet of floor space for the first occupant and 60 square feet for each additional occupant, calculated on the basis of total habitable room area, which does not include areas where floor-to-ceiling height is less than eight feet.

[29] 103 C.M.R. §972.03(2) provides that:
Multiple occupancy cells or dormitories shall have at least sixty (60) square feet of floor space for each inmate and where double bunks are used, a minimum ceiling height of nine (9) feet.

The record contains no evidence supporting the dire forecasts of the petitioners that the public interest would be harmed. In fact, there is no evidence in the record that the new jail is not fully able to accommodate the pre-trial detainee population. At the time the Sheriff's motion was heard by the district court, in March of 1990 -- prior to the opening of the new jail -- the average number of persons committed to the Sheriff's custody was 370. (J.A. 243). The capacity of the jail then in use, Charles Street, was 342. (J.A. 244). Even with this imbalance, the population was accommodated through use of a myriad of measures which operated either at the discretion of the Sheriff and the Commissioner or at the direction of the Supreme Judicial Court. None of these measures involved the federal court. In no case was a single prisoner released.[30]

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[30] The other Sheriffs of the Commonwealth, as amici curiae, state that there have been 241 "releases" in Suffolk County as a result of jail overcrowding. (Brf. at 21). This is simply not the case. The number 241 refers not to releases from custody, but to transfers to a halfway house under Order No. 16 of the Supreme Judicial Court. Although Order No. 16 authorizes releases on personal recognizance, there is no evidence in the record that this was actually ever done. Moreover, Order No. 16 contains its own method of prioritizing the detention of prisoners, according to state standards. Under the order, detainees charged with crimes of violence are not to be considered unless no suitable detainees charged with property crimes can be identified. Furthermore, personal recognizance is not to be entertained unless there is no halfway house capacity. (C.A. App. 389).

Prior to opening of the new jail, one of the measures frequently used was the transfer of detainees to other county

When the new jail opened two months later, the Sheriff immediately gained an additional 71 cells, bringing the total male capacity to 413.[31/] The Sheriff and the Commissioner consistently obscure the fact that on opening day the new jail was to have a single occupancy capacity which was greater than the average detainee population. The new jail has now been in operation under the single cell occupancy order since May of 1990. The record, of course, contains no evidence of actual experience since the new jail opened.[32/]

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facilities. Petitioners argue that when such transfers are made, detainees are sometimes double bunked in facilities inferior to Nashua Street. Petitioners ignore, however, that Suffolk County detainees are held in other counties only for a short period of time -- usually just a matter of days -- before they are returned to the Suffolk County Jail. These inter-county transfers, which may result in double bunking on an emergency and temporary basis, are fundamentally different from double bunking on a permanent basis at the Suffolk County Jail as proposed by the Sheriff.

[31/] As noted above, the male capacity has been increased to 419. See note 11, supra.

[32/] The Sheriff states in his Brief that "since the opening of the Nashua Street Jail the number of male inmates committed to the Sheriff's custody has remained in excess of the 419 cells available." (Sher. Brf. at 38). This is not in the record (J.A. 243) and is not correct.

The Massachusetts legislature has appropriate funds for a massive jail and prison construction program. It has appropriated funds for construction of new county correctional facilities in Suffolk (1986 Mass Acts c.658, §1), Hampden (1986 Mass. Acts. c.658, §4) Essex (1985 Mass. Acts. c.799. §8) and Norfolk counties (1985 Mass. Acts c.799, §8), and for

Furthermore, neither petitioner has ever explained why nothing less than the permanent revision of the decree is required. The Sheriff refused to consider adding temporary cells, even though he used precisely this expedient in the past.[33/] More fundamentally, even if, contrary to the record, there was insufficient ability to detain prisoners under the decree, this would require at most a temporary waiver of the Sheriff's obligation, pending the creation of more cell space. In 1984, in response to an increase in population the Sheriff sought and obtained more space, receiving a receptive ear from both the state court and the state legislature. Indeed, the Supreme Judicial Court held that the Mayor and City Council of the City of Boston have a mandatory, enforceable duty to provide a jail of sufficient size to comply with the requirements of the federal consent decree. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E.2d 361 (1985).

5. Finally, the petitioners here have not carried their burden of demonstrating that the proposed modification

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several new state correctional facilities, as well. (1986 Mass. Acts c.658, §5).

[33/] Modular cells were installed at the old Charles Street Jail by agreement of the parties to increase the capacity and have been used by the Commissioner as well. (C.A. App. 587; Inmates of the Suffolk County Jail v. Kearney, No. 89-1583 (1st Cir. November 13, 1989)). Plaintiffs proposed the installation of prefabricated modular cells in the rear yard of the new jail, as an alternative to abrogation of the single cell order. Modular cells could create an immediate increase in the total capacity of the jail of 48. (J.A. 236-38, 266-69).

will not result in a constitutional violation.

The Sheriff's proposal would double bunk 394 inmates, or 64% of the entire male population. Under the proposal, detainees would be confined in extremely close quarters for 12 hours per day, in "hermetically sealed" cells in which their movements cannot be kept under surveillance. (J.A. 183, 261-65). In this situation "regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal frictions" (J.A. 27a) is as assured as it was at the old Charles Street Jail.[34/] The detainees would be exposed to this regime over the course of lengthy commitments, lasting well over 60 days. (C.A. App. 653). It would not be an exaggeration to say that if such conditions were permitted to occur, experience would reveal a substantial and palpable threat to the personal safety of the detainees. Plaintiffs' concern is anything but fanciful: one inmate was murdered by his cellmate while the case was originally under advisement. (Sher. Pet. 27a). And the problem has little to do with the modernity of the facility; one can be as seriously injured in a new jail

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[34/] Pre-trial detainees are clearly under enormous stress:

> Pre-trial detainees are the most difficult individuals to keep in custody. They experience much greater tension than sentenced inmates. These tensions are a result of their unexpected arrest and incarceration, their inability to communicate with their family and friends, and their not knowing how long they will be held in custody, whether they can raise the money for bail when they will be tried, what is happening to their families and their possessions or what the outcome of their trial will be.

Affidavit of former Sheriff Buckley. (J.A. 188-89).

as an old one.

Under these circumstances, the single occupancy remedy is necessary as a protection against constitutional deprivation. The plaintiff class is composed of pre-trial detainees who, under Massachusetts law, are detained only to secure their appearance for trial. M.G.L. c. 276 §58; Commesso v. Comm., 369 Mass. 368, 339 N.E.2d 917 (1975). There are, therefore, two sources of authority, both rooted in the Due Process Clause. Under the first doctrine, an inmate enjoys the affirmative, substantive due process right to be protected, while incarcerated, in respect to the basic necessities of human life, and is specifically entitled to "reasonable safety." DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005 (1989); Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982). In Youngberg, the Court upheld the claim of an involuntarily committed mentally retarded person that he had a due process right not to be exposed to "unsafe conditions," acknowledging the "right to personal security" as an "historic liberty interest." See also, Revere v. Massachusetts General Hospital, 463 U.S. 241, 244-45 (1983) (medical care); Hutto v. Finney, 437 U.S. 678 (1978) (convicted persons have Eighth Amendment right to safe conditions); Estelle v. Gamble, 429 U.S. 97 (1976) (Eighth Amendment right to medical care).

Under the other line of authority, no unconvicted detainee may be subjected to any condition or restriction which amounts to "punishment". Bell v. Wolfish, 441 U.S. at 535. Accordingly, any condition of confinement to which a detainee is exposed is unconstitutional if it is imposed with the express intent to punish or is not reasonably related to a legitimate governmental objective,

in which case an intent to punish may be inferred. Bell, at 538-39; Schall v. Martin, 467 U.S. 253, 269 (1984); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). In Bell the Court surveyed a number of practices at a pre-trial detention center. The Court held that the practice of double celling a small portion of the detainees in a facility, 441 U.S. at 527, n. 4, for short periods of confinement, (generally less than sixty days), id. at 543, and only while they slept, id., did not constitute punishment. The Court reasoned that "[l]oss of freedom of choice and privacy are inherent incidents of confinement in such a facility." Id. at 537. The Court made clear, however, that there was no per se rule and that in another case, there might be another result.[35/]

The district court found it unnecessary to decide the underlying constitutional issue, and, accordingly, held no evidentiary hearing and made no findings on the point. (Sher. Pet. 12a). Nevertheless, without the single occupancy order, the detainees of the jail would be exposed to an unreasonable risk to their safety and, therefore, to unconstitutional conditions under either theory.

[35/] The Court noted:

> While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.

Id. at 542 (footnote omitted).

The contemplated conditions are far more serious than anything considered by the Court in Bell -- whether measured by danger threatened, hours per day exposed,[36/] the total length of confinement, or the number of inmates involved. While loss of privacy is a necessary concomitant of even pre-trial confinement, surely the risk of assault, rape or death is not.

Moreover, neither the Sheriff nor the Commissioner has ever contended that double celling is desirable in any way, except as a matter of expediency. Indeed, except for cases of emergency, the Commissioner prohibits the practice in cells of this size. 105 C.M.R. §972.03(2).[37/] See Hutto v. Finney, 437 U.S. 678, 688 (remedy did not interfere with official discretion where Commissioner of Correction himself disapproved practice). The Sheriff does not recommend the practice; he merely minimizes it, arguing that by adopting a system of classifying prisoners, he could reduce, although not eliminate, the threat. On this record, even that proposition is highly unlikely, as the Sheriff has never explained why he believes that two-thirds of the detainee population would be "suitable" for double-

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[36/] In Bell, for example, the court was unimpressed with the limitations in "walking space," 441 U.S. at 543, n.26, because inmates were only in the rooms to sleep and "[t]he rooms provide more than adequate space for sleeping." Id. at 543. In the new jail, however, where inmates would be confined in their cells for much more than sleeping, the actual amount of "moving around space" is even smaller than in the old jail, i.e. less than 40 square feet per cell. (J.A. 185).

[37/] See note 29, supra.

bunking.[38/] But more fundamentally, the detainees are entitled as a matter of substantive due process to be protected from any unreasonable risk of physical harm.[39/]

The defendants have failed to carry their burden to show that the decree is not necessary to prevent a constitutional violation. On a Rule 60(b) motion, it is the defendants, not plaintiffs, who bear the burden of proof on any element. In any event, even on the Bell theory, the Sheriff's decision to run the risk of a serious injury for 64% of the population, without having any demonstrable need to do so, cannot be characterized as reasonably related to any lawful purpose. Altogether, the Sheriff's chain of decisions -- to forego the opportunity to redesign, and then to double cell -- would constitute, at least, deliberate indifference to his obligations under the decree and to the safety of the prisoners.

[38/] J.A. 143.

[39/] See Dace v. Solem, 858 F.2d 385, 388 (8th Cir. 1988); Vosburg v. Solem, 845 F.2d 763, 766 (8th Cir. 1988) (evidence that guards could not see into double bunked cells); Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987); Alberti v. Klevenhagen, 790 F.2d 1220, 1284 (5th Cir. 1986); Riley v. Jeffes, 777 F.2d 143, 147 (3d Cir. 1985); Withers v. Levine, 615 F.2d 158, 161 (4th Cir. 1980) cert. denied, 449 U.S. 849 (1980).

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, the Court should accept the suggestion of the United States to remand for further consideration.

If the Court does remand for further consideration, it should direct that the district court to consider the motion in light of current circumstances. The original hearing before the district court took place on March 30, 1990. Naturally, the factual situation has continued to evolve. Any reconsideration of the motion should be made on the basis of current reality.

Respectfully submitted,

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